EXHIBIT A

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

In Re: Bair Hugger Forced Air Warming Devices Products Liability Litigation	File No. 15-MD-2666 (JNE/DTS)
	September 6, 2018
	Minneapolis, Minnesota
	Courtroom 9E
	9:00 a.m.

BEFORE THE HONORABLE DAVID T. SCHULTZ
UNITED STATES MAGISTRATE JUDGE

(MOTIONS HEARING)

APPEARANCES

FOR THE PLAINTIFFS:	MESHBESHER & SPENCE LTD. Genevieve M. Zimmerman 1616 Park Avenue Minneapolis, MN 55404
FOR THE DEFENDANT:	BLACKWELL BURKE P.A. Mary Young Peter Goss Ben Hulse 431 South Seventh Street Suite 2500 Minneapolis, MN 55415
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P R O C E E D I N G S

(9:06 a.m.)

THE COURT: Good morning, everyone. Please be seated.

All right. We are on the record in the Bair Hugger Forced Air Warming Devices, MDL Number 15-2666. Will counsel for the plaintiff note your appearance for the record, please?

MS. ZIMMERMAN: Yes, Good morning, Your Honor. Genevieve Zimmerman for plaintiffs, and a number of my colleagues are in trial right now and they send their regrets that they're not able to be here this morning.

THE COURT: Good morning, Ms. Zimmerman. For the defendants?

MS. YOUNG: Good morning, Your Honor. Mary Young for the defendant.

THE COURT: Good morning, Ms. Young.

MR. GOSS: Good morning, Your Honor. Peter Goss for the defense.

THE COURT: Good morning, Mr. Goss.

MR. HULSE: And good morning, Your Honor. Ben Hulse.

THE COURT: Good morning, Mr. Hulse. I hope you don't mind sitting on the bench.

MR. HULSE: Not at all.

THE COURT: All right. So I take it, Ms. Young, you'll be arguing the motion?

MS. YOUNG: Yes, Your Honor.

THE COURT: Go ahead. Beware or be aware I have read everything, so go ahead when you're ready.

MS. YOUNG: Thank you, Your Honor. So as Your Honor knows then at issue today is defendant's motion to strike two of the three case specific experts that plaintiffs have disclosed for the Axline trial on December 3rd. Neither of these experts have offered case specific opinions related to the plaintiff, and defendants move to exclude their testimony as untimely and improper.

Before discussing the specific experts, I just wanted to highlight two over-arching points. First, as Your Honor knows, discovery in this MDL is bifurcated by the Judge and that what that bifurcation means has become a point of contention really for the first time on this motion.

Defendant's position, a position we believe was shared by the Court or is shared by the Court and was shared by the plaintiffs up until now, is that general causation discovery covered issues related to all of the cases that cross cut the cases in the MDL. General causation certainly is one of those issues, but it also applies to other issues that would apply equally to other plaintiffs in this case.

On the other hand, we have case specific expert disclosures. And those case specific experts were intended to be bellwether case specific and to offer opinions specific to a plaintiff's case. The Court had an exchange with plaintiff's counsel on this very issue where the distinction was clear the Court asked plaintiff's counsel, "who do you foresee being a case specific expert?" And in response, plaintiffs essentially said it would be an anesthesiologist or an orthopedic surgeon who would be offering a case specific opinion.

So that distinction, Your Honor, general causation, general issues versus the case specific issues, that bifurcation has been made in the case and has been clear. Plaintiffs now on this motion argue for the first time that the general causation discovery meant something different. That it was a floor for the experts and that once their experts cleared that hurdle in the Daubert motions, they could now go ahead and offer new non case specific expert opinions at the bellwether stage. We fundamentally disagree with that distinction. And it would be contrary not only to bifurcation of discovery, but it would undermine the streamlining that the Court has done so that this MDL can move forward. The Court allowed general causation, general issues to proceed first so that the Daubert issues could be addressed and resolved and then we

are at a point now where bellwether cases need to be worked up efficiently and effectively. Allowing this new definition and to undermine the bifurcation would create a never ending cycle of expert discovery where you have non case specific issues being introduced and having to be dealt with in a specific bellwether case. And so at the outset, we think that is a fundamental issue that brings this motion.

While that is a distinction that's the backdrop, Your Honor, it really just is the backdrop here. The Court does not need to for the issues before Your Honor today, the Court doesn't need to grapple with the broader issues that plaintiffs are trying to interject here. Issues like what if we get to a point where a general causation expert can no longer participate? Inevitably, in an MDL we'll probably get there, we're not there today. So this isn't about this must be the case that we can never have new general causation experts. That is not what we are talking about here today. At this stage, we're only looking at the specific opinions offered by Dr. Bushnell and Dr. David and whether those two experts have offered proper opinions in the Axline case under the federal rules and under the Court's schedule.

THE COURT: Okay. Keep going.

MS. YOUNG: Thank you, Your Honor. Turning then

to Dr. Bushnell. Dr. Bushnell is a computational fluid dynamics expert offered to rebut defendant's rebuttal computational fluid dynamics expert Dr. John Abraham. There is nothing in his report that relates to Ms. Axline, and he says nothing about causation. His entire report is an improper sur-rebuttal report that provides hyper technical critiques of Dr. Abraham's CFD. It's really, Your Honor, just a rehash of the extensive cross-examination that plaintiffs have already done of Dr. Abraham. And no doubt a cross that's been informed by Dr. Bushnell because he sat through 14 hours of Dr. Abraham's deposition and certainly informed plaintiff's cross-examination of him, and they also cross examined him at trial.

So, Your Honor, this report violates the Court's Scheduling Order, which does not provide for sur-rebuttal reports, and Judge Noel made that very clear when he expressly denied plaintiff's prior request for likely this very sur-rebuttal report from Dr. Bushnell. Therefore, the report violates both Rule 16 and Rule 37, and it should be excluded here at trial as a sanction.

Plaintiffs have tried to recharacterize Dr. Bushnell as an impeachment expert. Defendants are not aware of any support for the notion that there is such a thing as an impeachment expert. The expert is clearly rebutting our rebuttal expert, and Judge Noel unequivocally

said there will be no replies to rebuttal experts. What you get are reports on issues where you prepare the burden of proof, a rebuttal, and deposition, and that has all happened here with respect to the CFD experts.

THE COURT: Let me ask you this, in general, as I understand the sort of dialogue that went on between the Court and counsel, the sequence was initial report, rebuttal report, depositions. And if the initial reporting expert had a response or a rebuttal to the rebuttal expert's report, that that was permitted to be offered and explored in the context of their deposition but that that -- so to the extent that there is any sort of sur-rebuttal, if you will, that was the mechanism and scope, mechanism for it and scope of it. Am I right?

MS. YOUNG: Absolutely, Your Honor. And to that point, the points that Dr. Bushnell seeks to rebut of Dr. Abraham's were in fact explored. The CFD that Dr. Abraham, while plaintiffs are arguing some sort of impeachment expert, the CFD was presented for the first time in May of 2016 at science day. It was posted on the Internet. So there's simply nothing that either wasn't explored previously in cross exam or could not have been explored. So there is a mechanism by which this information can come into the case and is in the case.

So, Your Honor, for the plaintiff's failure to

obey, first, the scheduling order, and then Judge Noel's subsequent and very clear statement that we will not have sur-rebuttals here, plaintiff's report of Dr. Bushnell should be stricken.

On a broader note, Your Honor, if sur-rebuttals are allowed, that certainly does set a very different precedent for this case, for expert discovery in this case. It would make meaningless the scheduling order, the Court's statements about the scheduling order and really there would be an opening of a flood gate in every bellwether case. Is it now open season? The plaintiffs get a sur-rebuttal, and how do we deal with that mechanism?

THE COURT: If this were allowed, this report, the Bushnell report were allowed, what would defendant's plan be for responding to it, if you know?

MS. YOUNG: Well, Your Honor, I do know because we've had to comply with other deadlines in the case schedule, so we have submitted a stand alone sur-sur-rebuttal report from Dr. John Abraham and that was provided to the plaintiffs on Tuesday. And so we have already incurred, we believe, you know, harm by needing to actually engage in discovery that was clearly in violation of a Court Order. We would need to depose Dr. Bushnell. If he weren't brought here, I understand he's in Seattle and then, of course, prepare for trial with respect to his

testimony.

THE COURT: Okay.

MS. YOUNG: So, Your Honor, I think that's an appropriate segueway to talking about Dr. David. That too allowing his supplemental opinions, albeit for different reasons, would be also an opening of the flood gates here and would undermine the Court's bifurcation of discovery.

As courts have recognized, if you allow improper supplementation of expert reports, what you essentially have is no finality, and you have a back and forth on experts whether that be in an MDL or in a specific case. So under Rule 26(e), while experts do have a duty and often have proper means to supplement their reports, that is not what Dr. David has done here because he has offered new expansive opinions on alternative design. They're not proper under Rule 26(e) and should be excluded under Rule 37(c)(1). That exclusion for improper supplementation is mandatory absent a showing by plaintiffs and a demonstration of the failure is harmless or substantially justified.

So to set the framework for that discussion, just wanted to highlight what it is that Dr. David has done. He does not purport to offer any Axline case specific opinions. He calls it a supplemental general causation report, so on its face, we believe it's clearly outside of the context of the rules. And then what he's done is offered seven what he

contends to be feasible safer alternative designs for the Bair Hugger, which run the gamut from a cotton blanket to other -- to conductive warming systems. And so these were all available, I think, very significantly.

This isn't the type of supplementation where there's been research published in the intervening time period or information that he couldn't have known about prior. These devices were all available at the time of his prior report. And at the time of his deposition, all of the research that he relies on in claiming that they're alternative designs were available. So --

THE COURT: Let me stop you there for a second. It's really of, I don't think, I think it's of no sequence but you made that statement in the brief as well. And from what was submitted, I couldn't quite see that those dates lined up. You said that everything but one study was available at the time the report was issued and that the additional study that wasn't available at the time of the report was available at the time of the deposition.

MS. YOUNG: Right.

THE COURT: But in your brief, those dates don't seem to track, so what am I missing?

MS. YOUNG: Your Honor, so are you looking at the page 8? We talk about the disclosure of its original report on March 31, 2017, and then the availability of all articles

by August 1, 2017. And I see here I believe the confusion would be about the likely the latest study would be July 2016. None of them appear to be in the -- I agree with you actually, Your Honor. I see that none of them --

THE COURT: That's before the disclosure, right?

MS. YOUNG: Right, are in the intervening time period. So I will have to confirm from that, but I think the point there is, Your Honor, that he was asked in his deposition about the four alternative designs included in his initial report, and he asked do you have any other proposed alternative designs? And he said no. And so to the extent these were proposed alternative designs, they would have been known to him, available to him, and it is now improper to add them into the case where, obviously, safer alternative design has been an element of plaintiff's claims and something they bear the burden of proving since that time of his deposition.

THE COURT: They make the argument that honestly I'm not sure I quite understand it, so I want you to explain it to me faithfully and certainly Ms. Zimmerman gets an opportunity to explain it as well. But the argument, as I understand it, is essentially something about the Gareis trial and the pretrial motion in limine made a difference in the disclosure for Dr. David, but I'm not quite sure I'm tracking that.

MS. YOUNG: Your Honor, we don't agree with that statement.

THE COURT: I figured that.

MS. YOUNG: Right. So the reason is that plaintiff's now have disclosed a number of electric conductive warming blankets, and they had also disclosed an electric conductive warming blanket, the VitaHEAT UB3 in the first report. So to the extent they're claiming that knowledge about that type of device somehow changed in the intervening time period. Frankly, it didn't. The VitaHEAT order stood, and it wasn't admissible, and they've now augmented that.

The TableGard was part of their initial report. It was also the only alternative design presented at trial, and they have now the warm cloud alternative design that would have a similar inflatable mattress, and so the idea that that new device came in somehow because of how the Gareis trial shaped up, we're not following that argument either. And there was no evidence about then they have not even devices but they have cotton blankets, the reflective blankets, and the prewarming. None of those are devices, none of those are modifications to the Bair Hugger system, and we don't see what happened at the Gareis trial that would change their view that those somehow are proper alternative designs under the law. So our view is that

argument is unavailing, and we're not following what the rationale would be for it.

So, Your Honor, as I mentioned, the sanction should be mandatory absent a showing that it was substantially justified, and I think Your Honor's question just went to that point of whether that in fact is substantial justification. It's our view that it is not. Also, in terms of whether this is harmless.

If the Court were to allow an expansion of the alternative design opinions in this case, defendants would be seeking leave to reopen discovery on those issues for whatever devices would be in play and don't see that the current case schedule and a December 3rd trial date would be viable in that scenario. So those are factors that the courts do consider in looking at harmlessness.

THE COURT: Did the defendants in the period of time after Dr. David's report was initially issued, did you, in fact, take discovery on the alleged alternative feasible designs?

MS. YOUNG: So there were the four. The Court had already ruled that the VitaHEAT was not a feasible alternative design because the Bair Hugger could not be modified.

THE COURT: Right.

MS. YOUNG: Plaintiffs themselves took discovery

of the two forced air warming devices, the Cincinnati Sub-0 and the Stryker mistral. In that intervening time period, we were satisfied with those responses so that obviated the need for defendants to seek any discovery. And then the TableGard, Dr. David was solely relying on a marketing brochure, and we made that decision at the time not to seek any additional discovery.

THE COURT: Okay.

MS. YOUNG: And so but in this case, given the breadth of these new opinions we would be seeking to reopen discovery. So we don't believe this is the type of supplementation, one, not proper to begin with; but, two, that would be considered to be harmless under the rules, which is the showing that plaintiffs are required to make in order to proceed with this design.

And then, Your Honor, just getting to the point of other factors that the courts look at the importance of the evidence. In our view if you propounded evidence that is not actually alternative designs that is legally viable, so you have products that have already been rejected as alternative designs, you have things that aren't devices certainly aren't modifications, that is evidence that we believe won't be coming into the trial, and we shouldn't be forced not only to spend resources developing responses to it, but then also potentially losing our trial date and

losing, you know, the schedule that we have here, so.

THE COURT: Regardless of the outcome, I think the chance of losing that trial date is virtually nil but understood.

MS. YOUNG: Thank you. Then we'll be very busy if we head in one direction here. So, Your Honor, it's our position that the Dr. David's improper supplemental report should be stricken and that no further discovery should be taken on it, and no evidence of those alternative designs should be allowed at trial. So unless the Court has further questions, I will rest.

THE COURT: Thank you.

MS. YOUNG: Thank you, Your Honor.

THE COURT: Ms. Zimmerman, I have a number of questions for you before you begin, so let me just jump to them. Regarding the Bushnell report, when was it prepared in its current form? And was that in fact the report that was the subject of the discussion with Judge Noel? I believe it was in June 15 of '17 status conference.

MS. ZIMMERMAN: Yes, Your Honor. The Bushnell report was prepared this summer of 2018 after the conclusion of the Gareis trial, and the defendants are certainly welcome to explore that if they choose to take his deposition.

THE COURT: Okay. So was it the contemplation in

2017 when you had this, as I understand it, a request, I don't know if it was a formal motion or not to offer or propound a sur-rebuttal report that was denied by Judge Noel, was it in fact the contemplation that it would be whether it was Bushnell or someone else a response to Dr. Abraham's?

MS. ZIMMERMAN: To be candid, Your Honor, I don't remember. I know that as we went through that process, so that if I can take a quick step back.

THE COURT: Sure.

MS. ZIMMERMAN: We talked about the science day and what was known about Dr. Abraham's opinions. First of all, science day was completely off the record. And there were videos, in fact, that were produced and shown to the Court in I think it was May of 2016. There were some of those videos available on You Tube, but none of the written report that Abraham has offered as supportive of his opinions in this case and also connected with the videos that are available on You Tube were produced to us until June of 2017 as a part of his rebuttal to Dr. Elghobashi.

So just to the extent that the Court is thinking that we had Abraham's report starting in 2016, we just didn't. We didn't have it until June of 2017.

THE COURT: Okay, but I'm not sure that ultimately helps the plaintiffs. If you had the report in June of 2017

or whenever it was, July of 2017, we're now over a year later, so I guess I'm not sure where that leaves you. I don't think it leaves you in a good spot.

MS. ZIMMERMAN: Well, yes, Your Honor. I mean I think a number of things have happened since that time primarily, and I wouldn't expect Your Honor to have read every single brief that has been submitted to the Court, but plaintiffs believed and continue to believe to this day that Dr. Abraham is not qualified to offer the opinions that he offered and that he did not follow an appropriate methodology. And so we moved --

THE COURT: But that ship sailed.

MS. ZIMMERMAN: It did with respect to general causation. The Court has allowed all of the experts that were disclosed to come in and offer testimony with respect to general causation issues.

And so fast forward to what happened in the Gareis trial, in the Gareis trial there were separate reports because it was a different machine. It was a Model 505 at issue in that case, so both Dr. Elghobashi and Dr. Abraham produced new reports for Gareis. And during the course of the trial, there were some limitations on our ability to impeach Dr. Abraham.

One of those limitations on our ability to impeach him actually was with respect to an order from Judge Noel

about whether or not his article was subject to the peer review process. That our attempt to impeach him with a Court Order was denied on hearsay grounds. So there's a number of different things that we need to do in our view in terms of impeaching Dr. Abraham.

What Dr. Elghobashi did with his general causation report on the Model 750 was to explain what the impact is of this particular machine on an operating room in a general way. He did not do a case, you know, he did not model each and every operating room for the 5,000 plaintiffs that are before the Court right now. So he has a report on the 750, and he has a report then on the Model 505.

And so with respect to what plaintiffs intend to use Dr. Bushnell for, and I will make a representation as an officer of the court, Dr. Bushnell will not be called unless and until Dr. Abraham is called to the stand again.

THE COURT: But, again, I mean I get that, but that just makes Dr. Bushnell's report a response to Dr. Abraham, right?

MS. ZIMMERMAN: That's correct.

THE COURT: But it doesn't make it specific to the Axline trial except for the fact that Dr. Abraham like other general causation witnesses are going to testify at that trial.

MS. ZIMMERMAN: Yes.

THE COURT: So I don't think it gets you to, and maybe you agree with this, but that's not a case specific report.

MS. ZIMMERMAN: Yes, Your Honor, correct. Plaintiffs concede that. So we do think that, and I think that we conceded this in our papers, that Dr. Bushnell's report is indeed a rebuttal to Abraham, but it is an impeachment rebuttal.

THE COURT: Let me stop you there. Impeachment it strikes me for lack of a better way of characterizing it, impeaching a witness is of course going after their credibility. Typical forms of that are you impeach them with a prior inconsistent statement, right? That's not this.

MS. ZIMMERMAN: Correct.

THE COURT: You can impeach them in essence by putting in evidence of prior criminal convictions, things of that nature. But, honestly, I've never done it as a practicing lawyer, and I haven't heard of an expert's opinion in this case, Dr. Bushnell being an -- it's not impeachment. How is it impeachment other than I just disagree with you? You're wrong.

MS. ZIMMERMAN: I hear the Court to say that we're wrong, and I believe that --

THE COURT: No, I mean that was my

characterization of Bushnell saying to Abraham, "you're wrong," but that's not impeachment.

MS. ZIMMERMAN: Right. Well, in our view, Your Honor it is impeachment. And we cite this *Peels v. Terra Haute Police Department* case. It's in the Seventh Circuit 2001, but we thought it was helpful because it talks about how the proper function of rebuttal evidence is to contradict, impeach, or defuse the impact of the evidence offered by the adverse party.

And with respect to Dr. Abraham, it's not simply -- certainly what he's going to be offering is his testimony, and some of his testimony, his opinions are based on his use of a computer program to conduct various, perform equations and solve them to understand what he believes the impact is of this machine on an operating room.

And what Dr. Bushnell did in the 70-some pages of his surrebuttal report was to say that's not what happened. If you use this particular computer program, here are all the different ways that Dr. Abraham's opinions are wrong because the equations were not solved the way that he said that they were.

So I guess I understand the Court's distinction that normally you would think about impeachment as somebody's, you know, you think that they said something different somewhere else, but here I think the reason that

Bushnell would come in is to say, look, if you use the computer that Dr. Bushnell said he used, these results, the results he claims are not correct.

And so the point of Bushnell's report is to demonstrate that Abraham's opinions, they're not based on an appropriate use of the ANSYS model of the CFD. If you plug the numbers in to that particular machine, that program, the numbers don't come out the way that Abraham claims that they did.

And so we need to have the opportunity to demonstrate to this Court and particularly to the trier of fact, who is not in this courtroom, that what Abraham claims to have done he didn't do correctly and that is to impeach the witness. It's to impeach the witness with math and with engineering. There's other impeachment of Dr. Abraham as well, but with respect to Bushnell, that's the point of that.

THE COURT: Okay, let me interrupt you for a second. A couple of observations. Part of this is the imprecision of language, right? I mean the word "impeachment" has both a precise meaning that's understood if you're impeaching the credibility of a witness, but it also has a broader meaning to undermine or to whatever.

First of all, I read the *Terra Haute* case. To me, I think the Court was using the phrase "impeach" in a

broader sense. But even without that, and you just called Bushnell's report a sur-rebuttal.

MS. ZIMMERMAN: It's a rebuttal. I'm sorry if I misspoke.

THE COURT: Okay, and I don't want to, again, I'm not trying to get hung up on precise words, but I think they do matter here because I think it is fairly characterized as a sur-rebuttal, which would take it outside what is permissible in the Court. And the notion of impeaching an expert with another expert's report really I think the Court in its prior order said if you're going to do that, you have two paths for doing it. Either you have to anticipate or if it's really something that comes up in their rebuttal report, in this case Abraham's rebuttal report, you have to be prepared for that and offer it in the deposition.

But what is not, I don't think, proper under the Court's order is to say we're going to put in a whole new report, call a whole new expert to call it impeach, call it rebut, call it what you want, it's hard for me to see how you squeeze that into what the Court already said was the proper order of things.

And, frankly, if Dr. Abraham got the math wrong, it seems to me that consistent with the Court's order, you can do that one of two ways. You can cross examine him. Obviously, that puts the burden on counsel to be able to use

the computer program or show in some other way, but I don't think consistent with the Court's order you get to bring in an expert to do that. But, I mean, you tell me, why am I wrong on that?

MS. ZIMMERMAN: Well, so, Your Honor, I think that, respectfully, that it can be a difficult task to kind of understand and articulate. I think that how you and particularly because the kind of science that we're talking about is very complicated. I mean I put Dr. Elghobashi on the stand during the trial. I understand enough of what he did to try to make it accessible for a jury and explain what his model did to show the impact of this machine on an operating room.

Dr. Elghobashi and Dr. Abraham used completely different methods. And I think that the case law that Your Honor would look to and, frankly, the case law that defendants cite to with respect to sanctions and talking about sur-rebuttal and improper bolstering and that sort of thing, those are all really in what I would call one-off cases where it's only one trial. There's only one set of reports, and you're not going to be dealing with as we are here thousands of cases down the road.

So with respect to what plaintiffs are supposed to anticipate from defendant's expert report. So this isn't the case where plaintiffs thought that we lay in the weeds

so to speak and came back around and said, oh, geez, we didn't have a qualified enough expert to anticipate or to, you know, defeat, I guess, the other side's computational fluid dynamics expert. I mean we hired a world renowned computational fluid dynamics expert in Dr. Elghobashi, and he performed what is now a peer reviewed internationally published paper on this particular subject. And so it's certainly not that we lay back and didn't understand what the issues were. We hired a qualified expert to handle these issues.

The challenge becomes then how are plaintiffs afforded an opportunity to appropriately examine the opinions of the defendant's expert when we don't get obviously a detailed report with what the equations are, what the assumptions are, what the real basis of the conclusions are, and the methodology by which the experts arrived at those conclusions. We didn't get that, of course, until after we disclosed ours, and that's the nature of litigation. And I appreciate that there does need to be at some point a spot where the Court says, okay, there's no more reports, but it can't be to deny the plaintiffs the ability to show that the opinions that Dr. Abraham intends to offer to the jury are not based on appropriate methodology. They're not based on a reliable use of the ANSYS model.

THE COURT: Well, I think, two reactions to that. One, that gets then back to what they say, which is Dr. Abraham's study was available on science day and has been posted on the website. Go ahead.

MS. ZIMMERMAN: Well, his videos were, yes, the detailed reports.

THE COURT: Okay. And the difference being you didn't have the computer program or you didn't know what computer programming he was using?

MS. ZIMMERMAN: Correct. I mean we do from the first time we saw it, we thought that it was incorrect, but until we know what the inputs are, what the boundary conditions are, what the different assumptions are that he makes in generating a video. I mean I could probably go on my iPad and generate some sort of a video and say that this is what the impact is of the Bair Hugger in the room, but until somebody really has the opportunity to explore, well, you know, Ms. Zimmerman what's that based on? There's not really an ability, I mean I can put up all kinds of videos and that doesn't mean that I understand or anybody has the ability to understand what the kind of underlying basis is of the opinions of the videos I would make.

THE COURT: But that then leads to the second observation, which is the plaintiffs have had Dr. Abraham's reports since July of 2017?

MS. ZIMMERMAN: Yes, sir.

THE COURT: And took his deposition by August 16th of 2017?

MS. ZIMMERMAN: Yes.

THE COURT: Had an intervening trial, the Gareis trial?

MS. ZIMMERMAN: Then we had another round of reports and then a trial, yes.

THE COURT: And another round of reports is what?

MS. ZIMMERMAN: So the first report that we received from Dr. Abraham was limited to the Model 750, which was not at issue in Gareis, so that was produced in June of 2017. And we took his deposition I believe in July of '17.

THE COURT: Right.

MS. ZIMMERMAN: Then we had the Daubert motions and briefing in September and October. There were new reports produced on general causation issues with respect to Gareis on the Model 505.

THE COURT: That was allowed by Court Order, right?

MS. ZIMMERMAN: It was.

THE COURT: Okay.

MS. ZIMMERMAN: And those were produced in December of 2017. Depositions took place in January and

February and then the trial in May.

THE COURT: Okay. So why wasn't this all done a year ago or a half a year ago?

MS. ZIMMERMAN: Respectfully, Your Honor, because we believe that Dr. Abraham would and should be excluded on Daubert based on his testimony at deposition.

THE COURT: But that testimony in deposition that you're relying on to be the basis, hopefully, of a Daubert motion is stuff that took place in early '18 or in the summer of '17?

MS. ZIMMERMAN: Summer of '17.

THE COURT: So, but, I mean you do see the issue, right?

MS. ZIMMERMAN: I do see some of it, yes.

THE COURT: Okay. So you had this problem you thought existed. You think the Court got it wrong, shouldn't have allowed the opinion in, but I mean that's literally over a year ago. So I mean to me that seems like another hurdle you're facing even if the Court were inclined to allow it, we're essentially on the eve of the Axline trial.

MS. ZIMMERMAN: Absolutely, Your Honor. And so I think that maybe this is one of the reasons that it's important and why we included, you know, probably a very basic recitation of what is an MDL and why are we here and

where are we headed? So if these trials are to be useful to the Court and to the parties in understanding where we head and when we head there, we need to be able to try a complete case, a complete case involving warnings and conduct and negligence and all of those things, and that's going to be subject to motions that are I believe coming down the river I guess.

But we shouldn't be doomed to do the same exact trial again because, and that I guess is one of the reasons to have a rebuttal report from Dr. Bushnell. You know, in addition as we read various case law, we were concerned that we wouldn't be allowed to call Dr. Bushnell in rebuttal at trial of the Axline matter if we haven't disclosed a report from him. Although, under the Court's scheduling order we're not allowed to disclose a rebuttal report.

So we thought particularly because he's not going to be -- he would be providing, we think, real substantive evidence if he's asked to come to rebut and impeach Dr. Abraham, it's going to be based on math and science and the application of the engineering software to the facts as Dr. Abraham claims to have used them, that that's going to be a real piece of evidence that's important in Axline and should we have called, you know, Dr. Bushnell without an expert report or attempted to do so in Gareis? Perhaps. Perhaps we should have.

THE COURT: Okay, but yeah, in response to the general comments about MDLs, I agree with you, obviously, that one of the whether it's the desired function or the reality of bellwether trials is, you know, obviously, you try and assess your likelihood of success and the value of your cases, that, obviously, has its place. But there's also the function you mention, which is you go through one trial and both sides figure out what lessons they've learned and how to better present the evidence in the next trial.

And I agree with you, maybe there's additional evidence that should be considered by either side to present in the next trial, but there's a gap between that, which is, at least in my view, the function of case specific expert testimony and case specific discovery, and we're going to go back, and we're going to reconfigure the playing field by reinvestigating, if you will, sort of the general issues that are common to all cases. That can't be the function of a bellwether trial in an MDL because then it is purely chaotic, and we don't achieve efficiencies.

And the argument I'm hearing is, essentially, well, now we have, we've come up with a better, in our view, a better way of attacking Abraham and that may well be true, and that may well be sort of hard reality that you're limited in how you go about that, but I don't know that the cure for that issue is to just throw out the Court's very

clear in my mind distinction between general causation and case specific causation, and its admonition that there are no sur-rebuttal reports.

And so I mean I understand your argument, but I think the logical extension of that is that none of this stuff that was done in advance to be across the board has any force and effect to it.

MS. ZIMMERMAN: So, Your Honor, if I may, I'll offer just a couple of reactions and observations. I agree with you that there have been discussions between the party and the courts about this use of sur-rebuttal reports and is that appropriate? But one thing that is we, obviously, have a difference of opinion as to what is general causation? And I bring that up because as we think about what are we going to do with this next trial and, you know, case specific issues and that sort of thing? What there is certainly not that I'm aware of anywhere in any of the case management orders is some sort of edict or proclamation or limitation that plaintiffs will be limited in all ways for all experts in each of the individual cases to both the experts and the opinions that were offered in the general causation phase.

And in our responsive briefing we cited to a number of different courts that really talk about the definition of general causation and that's really is this

particular device capable of causing the harm the plaintiffs claim? Is there reliable evidence of that? Because if there isn't, we should stop right now, and we shouldn't put the Court through the trouble and the defendants through the trouble. We should stop; and that's really what the point is of general causation. We're past that.

And, frankly, jumping ahead, but Dr. David's report really probably doesn't touch on general causation at all, right?

THE COURT: Right.

MS. ZIMMERMAN: Because it doesn't address the issue about whether the machine --

THE COURT: Right, I want to stay on Bushnell because to me they present different issues, and they are different types of reports. But whether the Court used the phrase "general causation" in its strictest sense or not, I don't think it did, but I think it was also very clear that expert testimony that would be cross cutting a wide swath of cases. In other words, something that's not, well, let me ask it this way:

I am assuming that if this report were allowed, you're not, the plaintiffs aren't taking the position that, oh, we're only going to call Dr. Bushnell in the Axline trial, right? I mean you're not going to concede that it's only relevant to the Axline trial?

MS. ZIMMERMAN: I think that that's correct, Your Honor. I mean, if, and we said this in our papers, if Dr. Abraham comes, Dr. Bushnell is what we're going to use to show that he just -- he's not telling the truth about what he did.

THE COURT: But that wasn't my question, respectfully. My question is, you know, the plaintiffs, there's no question that Dr. Abraham, whether or not his report is any good or it's just pure junk and whether or not it should be allowed into evidence at any trial on down the road, there's no question that it was timely disclosed.

And if he's allowed to testify, the defendants are saying we're going to put him on the stand in this next bellwether and the one after that and the one after that, and I'm not hearing the plaintiffs say, well, we're going to call Bushnell but only in Axline because it's not Axline specific.

MS. ZIMMERMAN: Yes, Your Honor. However, so we have reports, and I brought copies if you'd like them. Ms. Young alluded to them, at least two of the reports that we've got from defense counsel this week, both from Abraham and from Dr. Mont, are repeat with general causation opinions. And we highlighted for Your Honor the general causation opinions that are in Abraham's report. These are all rebuttals to Elghobashi, again, and Elghobashi didn't

write a report for Axline.

Abraham has submitted an additional report on Axline that tries to rebut Elghobashi and also touches on some Axline specific issues, and then a second sur-sur-rebuttal report to Dr. Bushnell, which I would note for the Court I think points out that there really isn't prejudice. They've had the opportunity to explore his opinions and rebut them, and he's been offered for deposition. And the same thing is happening with respect to Dr. Mont.

So I guess the question the plaintiffs would have then is if general causation is both the floor and the ceiling for both plaintiffs and defendants, will Dr. Wenzel be called to the stand? He's the infectious disease doctor that the defendants disclose in the general causation phase. He hasn't provided a report in Axline. Can we compel him to come to testify to the trial in Axline and any subsequent plaintiff? We'd like to.

But so I guess this is the reason that I think that the words really do make a difference. You know, what is general causation? What was intended as we went through that phase? From the plaintiff's perspective, that general causation phase was really to do some permitted discovery about general causation issues and then, and because there's a number of things that we wanted to get into that we were

not allowed to get into, and then to get into the case specific workup.

So if we had changed the caption, if we had changed the caption and instead of saying for Dr. Bushnell, say that this is Axline specific, and say that he's going to offer the following as impeachment if he's called during Axline, would that be permitted?

THE COURT: No, that wouldn't change it. I agree with you, but the point is his opinions are, the plaintiff isn't saying this is only relevant to the Axline case, which I think you've conceded, and I get that. I understand you're really making a different argument.

What I'm saying is that as I understand the Court's prior orders, if you want to have Dr. Bushnell testify in the Axline trial, what you would have to do is have Dr. Bushnell or Dr. Elghobashi, or however you pronounce it --

MS. ZIMMERMAN: Well done, Your Honor.

THE COURT: -- actually model the Axline surgery suite and run computational fluid dynamics computational fluid dynamics in that suite, and then say given the particulars of that surgery suite X follows or Y follows or what have you. And so I mean I think the issue just simply comes down to this is a rebuttal to nothing that is newly disclosed. It's beyond the time period for general

causation reports, and the gist of the argument is but we regret not having or we think this is a better way to approach it, but it still seems to me to run afoul of the Court's order.

MS. ZIMMERMAN: So I think that from the plaintiff's perspective, we disclosed this report in an abundance of caution anticipating we will have a rebuttal case in Axline and potentially in other cases and that that rebuttal case after the close of defendant's, you know, evidence, assuming that they have called Dr. Abraham, then we would call Dr. Bushnell to explain why it is that Dr. Abraham's testimony is not reliable and should be discarded by the jury.

We have now taken an extra step ahead of time to explain in great detail what his specific criticism will be of Abraham. If the Court wants to set aside the report and, you know, and they don't want to take his deposition in advance of the trial in December. And, you know, I don't see any reason, I understand that they complained about whether or not the Court should have to consider a Daubert motion on Dr. Bushnell, we could set all of that aside. The plaintiffs still have the opportunity under the rules to have a rebuttal case. And what we have tried to do in disclosing this particular report is identify for the Court and for defendants this is what our rebuttal case will look

like. And, respectfully, we don't see anything in the Court's order even where it says there's not rebuttal reports that denies the plaintiffs a rebuttal case. And in fact, we don't think that that would be permitted under the rules.

So it's fine with us if we all want to say that, oh, this wasn't disclosed or you don't want to depose him, that's fine. But in December, when they rest, we're going to call him if Abraham came. And we want to make sure that there's not an argument made at that time that this is a surprise to them for the first time or that they haven't been able to explore his testimony.

THE COURT: Right. No, my comments earlier about, you know, you've had the reports since 2017 notwithstanding. I agree with you that certainly if your intention is to attempt to call Dr. Bushnell to testify, it was prudent to disclose a report.

Where you and I part company, I think, is in two places. One, I don't think this is impeachment, at least not in the form that one doesn't have to disclose it, because I agree with you that impeachment, real impeachment, true impeachment doesn't have to be disclosed, and it's not in the form of an expert opinion, number one.

Number two, I think that, you know, the ultimate extension of your argument is that Judge Ericksen and Judge

Noel, the Court, just got it wrong and has denied you somehow due process by allowing for an initial report and a rebuttal report and no sur-rebuttal reports. That's the ultimate extension of your argument, and I for one am not going there, so but...

MS. ZIMMERMAN: Certainly understood. I think that from the plaintiff's perspective, respectfully, where we think that the Court got it wrong was on Daubert. And I understand that that ship with respect to Gareis is awaiting the Court's decision with respect to our motion for a new trial. And, you know, at some point, we'll maybe go to the Eighth Circuit, and we'll find out, you know, we got the law wrong. That's certainly a possibility, maybe even a probability.

But I think that the plaintiffs really do think that this is -- it is closer to a normal impeachment. And I know that it gets complicated because it's not the same as, you know, you claim to have been somewhere you weren't, and we're going to bring in someone who says they saw you there that day in a criminal case. It's much more complicated than that.

This is really impeachment to say you say your calculator did, you know, one times two, and it came up with this answer, but we have your calculator. We have the same program, and we know if we put those numbers in, it doesn't

come up with the number you claim.

So I know that it's more complicated, and I appreciate that the plaintiffs may have a different position, and the Court may see it differently, but that's why we see this as a real impeachment witness, that we would bring Dr. Bushnell to show that Dr. Abraham's calculator is wrong.

THE COURT: That would limit his opinions if allowed to a very narrow, right? A very narrow scope?

MS. ZIMMERMAN: Yes. I mean Dr. Bushnell, if he were allowed, would come to speak only about what it is that Dr. Abraham claims to have done with his ANSYS program and what those results would show if the same numbers were put into the actual calculator and what is generated from there. That's the only purpose of Dr. Bushnell.

THE COURT: Okay. So, let's talk about Dr. David for a second.

MS. ZIMMERMAN: Sure.

THE COURT: So this isn't a question of whether it's an improper sur-rebuttal. It's really -- it's a question of whether this is a proper supplementation of his original report.

MS. ZIMMERMAN: Yes, Your Honor.

THE COURT: Right? And at least as I hear the defendants, maybe you disagree, but it seems to me all of

these devices existed at the time of the initial report, all of the studies on which Dr. David relies either existed at the time of his original report or at the time of his deposition. So in terms of at least as I understand the supplementation rule, there's nothing new here, and so, again, I'm struggling to see why this is proper supplementation?

MS. ZIMMERMAN: Thank you, Your Honor. I appreciate the opportunity to present to the Court on this.

I think that this supplement of Dr. David is particularly important as we think about it in context of this broader MDL. And the reason that I say that is that there are different requirements for what a plaintiff needs to prove from a reasonable alternative design perspective, whether you're applying Minnesota law, Wisconsin law, Iowa law, which is maybe what's going to apply to Axline. South Carolina law, which is what did apply in Gareis or any number of the other states.

So while the plaintiffs certainly disclosed Dr. David's report in the general causation phase to demonstrate, look, there are a bunch of alternatives. There are other products on the market that have warnings, warnings just like the Bair Hugger used to have, and for some reason, this product doesn't have anymore.

You can use cotton blankets. You can use all

manner of different products, all of which are known to the defendants and have been for a long time. I've attached, I think, as Exhibit 6 just a color coded sheet that demonstrates what the defendants have thought in terms of who is out there? What's safe? What's effective? They've got it pretty easily figured out here in a green, blue, red schematic.

But, and I did want to make one point with respect to counsel's comments that these are totally different products. Certainly, the prewarming with the Bair Paws, that is defendant's product. It is the exact same application of the exact same technology. The only thing that happens there is that it's done before an operation and that the warming therapy has stopped prior to an incision. And according to the defendant's own documents, and I think it's at Exhibit 1 of our motion, and I think I got that wrong.

Pardon me, Your Honor. It's Exhibit 3, demonstrates that the defendants have known this for quite some time, certainly well before Axline, certainly well before the vast majority of cases have been filed in this MDL.

So that is certainly not a different technology. It is the defendant's own technology, and they're own documents say that that is an effective way to warm patients

and that it avoids the kind of risks we're talking about here. And that you can see in the chart where they summarize the pros and cons of using the Bair Paws prewarming versus the Bair Hugger during an operation. And they say contraindicated in orthopedic surgery, they say the Bair Paws avoids things like nosocomial infections and contamination of the sterile field. These are the most critical issues before this Court.

So it's not that they didn't understand about pre-warming as an alternative therapy. And with respect to different kinds of technologies like cotton blankets, for example, those have been around for a very, very long time, and according to their own chart, that's the safest way to go, and it's the most effective, and it's the most widely used.

So I think that the issue is not which technologies were known and when because these technologies were certainly well-known to defendants, but there have been, and I think Your Honor had -- it looks like maybe you have another question --

THE COURT: Go ahead.

MS. ZIMMERMAN: I was going to talk a little bit about what happened with what I call the VitaHEAT motion. So VitaHEAT is now also owned or exclusively distributed by defendants, and it is essentially an electric blanket.

Plaintiffs sought to do discovery during the course of when discovery was still open, and they refused. They said it wasn't relevant because it was a different product.

Now, the reason that this is important is that, you know, a lot of different states, West Virginia, for example, I'm involved in the transvaginal mesh litigation out there. Illinois, certainly, and many other states when you have a device, you can look at the predicate product, the product that they say is the predicate product for getting through the 510(k) process and that that is always, always going to be an alternative design. So, and that's case law in various MDLs.

THE COURT: Right.

MS. ZIMMERMAN: But in this Court, when we sought to do discovery on VitaHEAT, and VitaHEAT, of course, claims as its 510(k) predicate device the Bair Hugger, we weren't allowed to do it. It was denied on a relevancy objection, which was, you know, granted -- it was ordered by the Court and sustained by Judge Ericksen, and we understand that, but it does impact what the plaintiffs were able to do from a discovery standpoint. And it really has, it has impacted throughout during the entire litigation.

Now, something changed a little bit in pretrial proceedings right before the Gareis trial this spring. And there the Court said, look, you know, you might -- this

whole idea that reflective technology or VitaHEAT is completely not relevant, that might not really be the case anymore. And we think that that's correct. Of course, we don't have a written order to that effect, but counsel was present when the comment was made. And it's changed kind of how we approach Gareis, and it changes how we approach Axline. And I think that what is required and allowable in all these different states really makes a difference as we think about Dr. David's report.

So, for example, and I won't relitigate this, but in South Carolina, you can have a reasonable alternative design even if it's a completely different product. That may not be the law in every state. And we still don't know right now whether Minnesota law is going to apply to the Axline case or is it going to be Ohio law? But there are variations throughout --

THE COURT: Yeah, but, again, the line you're drawing or the ultimate implication of the argument then is there's no -- there's really no such thing as a general causation or a general feasible alternative design because not, I mean that's not -- feasible alternative design isn't case specific. There's a difference between case specific, which are what are the facts of your case, and did this cause your injury in this case? That's case specific.

What you're positing is an argument that we only

have to disclose just a baseline. Here's some feasible alternative designs, and then down the road given the law in jurisdiction A, we can do a whole new opinion that discloses other feasible alternative designs. And I guess where I struggle with that is while I understand the conundrum it puts you in, it doesn't seem to be consonant again with the Court's Order, which is everything you're going to do that cross cuts cases, that is not dependent on the facts of this person's particular experience really has to be done now.

And so it does put a burden on the plaintiff to say, all right, some states allow a very broad definition of feasible alternative designs. Some states allow predicate devices in the 510(k) process to be alternative designs. Other states take a more narrow view, so we're going to disclose all of these alternatives, and the Court will decide in any individual case whether in the law of that jurisdiction that would be admissible or not. That seems to me to be the burden that the plaintiffs carry under the structure that this Court's put in place.

MS. ZIMMERMAN: So, respectfully, I don't think that that burden was clear to the plaintiffs at any point during this litigation. And it's not the same kind of burden that's placed on plaintiffs in every other MDL that I've been involved in or that I've researched where general causation reports are then applicable to the universe of

cases both on file at the time that they're disclosed and that ultimately join the MDL.

So, for example, in Minnesota there are some -- I think it's the *Kulio* case, where if a product is unreasonably dangerous or essentially there's no benefit to it, you don't even need to show that there's a reasonable alternative design. You can just say, look, this is too dangerous. We're not going to have, you know, three wheelers I think are one of the things people talk about a lot.

But if there is to be such an edict from the Court that the four corners of any of these reports are both the floor and the ceiling as we refer to in our motion papers, that needed to be clear, and it certainly shouldn't be held against Ms. Axline or subsequent plaintiffs down the road because if Ms. Axline could have, and I'll note by the way that this whole motion of course is styled in the MDL generally, and we keep talking about Axline because that's where we're headed next. But Ms. Axline could have had either Dr. David or I suppose a completely different engineer or specialist of some kind prepare a case specific report saying that all this is here.

THE COURT: I don't think so. I think by definition feasible alternative design is not case specific. I think that's where we're sort of talking past each other.

MS. ZIMMERMAN: Okay.

THE COURT: And I think the other problem you have is to the extent that the law varies from jurisdiction to jurisdiction, Dr. David's initial report took account of that because he included conductive patient warming devices. He included the VitaHEAT. But the position that you're in is the plaintiffs are saying, geez, we could have put a lot more examples into the bucket.

And so I don't think it's a notice problem that you didn't have notice that somehow you should identify everything that might be a feasible alternative design in the first instance, and that's what you're essentially arguing that you didn't have notice that you should have done that.

MS. ZIMMERMAN: Okay. Well, I think from the plaintiff's perspective, and this gets again back to the definition of general causation versus something case specific, and I think we're in agreement that for the most part a reasonable alternative design probably isn't going to be a case specific issue.

I do think that we have a little bit of a difference of opinion I guess on when it may be case specific and that is so for Axline, for example, she's in Ohio. I don't know if Minnesota law is going to apply or Ohio law. She's 2009. There may be some technologies that

are available in 2009 that aren't available before that where somebody from 2015, you know, in Wisconsin would have different alternatives.

I hear the Court to be saying it's the Court's understanding that the plaintiffs should have had every single conceivable alternative design disclosed in Dr. David's report. You know, I guess that, and that's certainly the Court's sense. So, you know, I respectfully disagree with that, but I certainly hear the Court, and I won't belabor the point.

THE COURT: No, you know, and I'm not picking on you. I'm trying to really understand where we are and the basis of the argument, but, again, the last point about, you know, Ms. Axline's surgery was in 2009, so, you know, some of these alternatives weren't available. That's certainly true or it could be true. But that's, you know, that's a question of when it comes down to actually decide what evidence gets in at trial. That gets managed in motions in limine it seems to me.

MS. ZIMMERMAN: Absolutely. And, you know, I mean in some states a prototype or, frankly, an idea is sufficient for reasonable alternative designs. And so we certainly I mean we can have maybe some ideas about certain prototypes, but we don't know every single idea that was out there. We know some that were in some of the documents that

were produced to us, and those were included in Dr. David's report. And, you know, plaintiffs may well just have to explore the alternatives that the defendants were aware of through the defendant's own witnesses, and we'll certainly take the opportunity to do that if afforded that.

THE COURT: Right. And that's the other issue sort of under-coursing this whole discussion is what we're really arguing about is the form of the evidence at the trial, which is to say you may not be allowed to call an expert to say this was out there. In my opinion, it was a good feasible alternative. It should have been used.

MS. ZIMMERMAN: Absolutely.

THE COURT: But at least today it certainly isn't my place to decide this, and it won't be, but today nobody is saying, well, you don't get to ask the defendants if they knew that cotton blankets existed, right? I mean that comes down to a difference in form. You want to be able to have an expert with the fancy credentials say all of this.

MS. ZIMMERMAN: Right.

THE COURT: But that's different from saying you don't get to cross examine the defendants about their knowledge.

MS. ZIMMERMAN: Right. And without, again, relitigating what we're going to do, we had some issues where we were precluded from doing that because the

witnesses were not experts so, again, a reason to supplement Dr. David's report. But I think we'll fight that fight down the road.

THE COURT: Right. And, of course, you know, I mean obviously I don't have as deep and broad a knowledge of all the proceedings that went on before this, so motions in limine that may have played in here, you know, some of it may be as something I'm unaware of now, but I don't think it really matters to the decision that I'm being asked to make but.

MS. ZIMMERMAN: And I did bring extra copies if the Court would like them of some of the defendant's expert report that really touch on general causation issues. And so to the extent that the Court is issuing or considering issuing an order that's going to strike general causation supplements from Dr. David and/or Dr. Nathan, we certainly would request as I'm standing here, we move the Court that the same rule be applied to the defendant's experts as well.

THE COURT: Well, I think you can rely on -- I think you can take comfort in the notion that the rule will be applied, whatever the rule is, it will be applied even-handedly and to both parties. I can't make any kind of statement about what the defendants have produced without a formal motion and without study of what's produced. So if you think they're over the line, and if in response to

whatever we rule on this motion, you think that line clearly plays in your favor, then I encourage you to bring the motion. Okay?

MS. ZIMMERMAN: Thank you, Your Honor.

THE COURT: Okay, thank you, Ms. Zimmerman.

Ms. Young? So I have a question for you. Come on up. Why isn't Dr. Bushnell's report impeachment?

MS. YOUNG: So, Your Honor, listening to that exchange, in my view, every answer took us right back into cross-examination of an expert. And so if we were to suddenly open the door and have this new found impeachment expert, this would be a never ending, frankly, a lot of sand bagging. The whole point of expert discovery is you have a full and fair opportunity to understand the opinions of the expert.

And to Ms. Zimmerman's point that Dr. Bushnell is now somehow needed to allow them to better cross examine Dr. Abraham or discredit him, she talks about only having access to the video on You Tube. Well, after science day, plaintiffs subpoenaed Dr. Abraham and his CFD file was produced to them in the fall of 2016, which was before any CFD expert was in the case.

So to the extent they want to run software, figure out what calculations were done, that was available to Dr. Elghobashi in the first instance or to Dr. Bushnell if they

wanted to engage him prior to that. And also Dr. Bushnell was at Dr. Abraham's deposition. To the extent that lawyers need expertise that is beyond what most of us understand, it was our understanding he was actually helping manipulate the software to assist in their cross-examination.

So we think that is just, one, admonished by the Court as Your Honor pointed out by Judge Noel no sur-rebuttals, and it just opens the flood gate here. MDL or not, there is just simply nothing in the federal rules in this Court's scheduling order that would allow for this type of sur-rebuttal, which is just cross examine under a different name.

Your Honor, very briefly, then, just on the point as to what general causation is and isn't here. I think based on the Court's comments, there is -- we're on the same page on that. I do want to just point out that as plaintiff's know, fact discovery was much broader than issues of general causation. They delved into regulatory issues, alternative design, deposed I think it was 20 witnesses of 3M's. There was nothing about that whole phase of the case that would have suggested to either party that we were simply talking about whether Bair Hugger was capable of causing an infection, and so that I don't think more needs to be said on that.

And then just one final point, Your Honor, again,

where I think I started the argument is that what's before the Court today are two specific experts at this procedural posture in the case. What I hear plaintiff saying is we want relief potentially from the earlier scheduling order. There may come a time where we need to do more on general causation. These experts report in the Axline bellwether case 90 days or so before trial simply could not be that mechanism to visit that issue, and so we believe that these experts should be excluded at this juncture, and that would be all I have to say.

THE COURT: Thank you.

MS. YOUNG: Thank you.

THE COURT: Okay. It is 10:21. I'm going to take a brief recess. I think, you know, obviously, you're three months from trial. You have a lot of things going on. It strikes me that it would be wise to get this ruling out as quickly as possible so everyone knows the playing field. And I want to go review my notes, and I'll decide whether I'm going to rule today from the bench, so that you know that, or whether I think it really needs to wait for a more fulsome written order. But if I do rule from the bench, I will follow it up with at least a written order that lays some of this out. And I will articulate a rationale as well on the record if I do that. Okay?

All right. So why don't we reconvene at 10:35.

Okay, thank you. Court is in recess.

(Short recess at 10:22 a.m.)

(In open court at 10:37 a.m.)

THE COURT: Please be seated.

All right. Good morning again, everyone. We're on the record in the Bair Hugger Forced Air Warming Devices Products Liability Litigation MDL 15-2666. I will give you the benefit or the detriment as the case may be of what I think is the proper ruling here.

Let me say to both sides, I appreciate the arguments. They were well conceived. I appreciate the briefing. I think the issues are interesting and well prepared, and I felt like the Court was well informed on everything. So thank you to all of you on that.

And, you know, without further ado, I will grant the defendant's motion and exclude both the Bushnell report and Dr. David's supplemental report. And I will give you my rationale for doing that. The rationale is slightly different as to each or maybe not slightly but different as to each.

By way of general background, I do generally agree with the defendant's characterization of sort of the backdrop against which these motions get played out. The Court did set deadlines for disclosure of general causation experts. They set those deadlines first in pretrial order

number 4, and then that was amended in pretrial orders 13, 17, 20, 21, 22, and 26, but the operative date for purposes of these motions was the initial disclosure date, which did not change after I believe pretrial order 17, and that date was March 31 of 2017. So and, you know, obviously, there's no question that the reports at issue today were served after that date.

The Court in its scheduling orders and as clarified, I think, or amplified in its status conferences really distinguished between reports on general causation was the phrase that was used and case specific causation, but as reflected not only in the pretrial orders, but also in the status conferences of September 8th of 2016 and June 15th of 2017. What the Court really distinguished was between expert reports that were general in nature, that is cross cutting on a wide variety of, if not the majority of, cases in the MDL, so general issues as distinct from opinions that would be specific to a particular case. And the example that was used both by I think Judge Noel, but also in response to Judge Noel and in correspondence with the Court is that an example of the case specific expert opinion would be an orthopedic surgeon or a treating physician who would come in and say something about in this example Ms. Axline's surgery or Ms. Axline's infection. There's no question that general causation experts can also

issue case specific opinions, but they have to be case specific opinions. And I think it was very clear what distinction the Court was making as well as very clear that in its orders, the Court would not allow sur-rebuttal reports.

So with that sort of background in mind, I turn to these two reports. Dr. Bushnell's report, I think the plaintiff's wisely concede that it is obviously a direct response to the report of the defendant's expert Dr. Abraham, and it's unabashedly a rebuttal to that report. Dr. Abraham's report was, of course, a rebuttal to the initial report by Dr. Said Elghobashi.

So by definition, Dr. Bushnell's report is a sur-rebuttal, and it's not permitted by the Court's pretrial orders, and it's, in fact, prohibited by the Court's pretrial order. And I'll note that it doesn't reference Nancy Axline or the specifics of her case or attempt to do any computational fluid dynamics with respect to her surgery suite or her operation.

It could have been done earlier. I am persuaded, first of all, by the defendants that the information which Dr. Bushnell wants to critique Dr. Abraham on was available to the plaintiffs in advance of the initial report. Certainly, it's been available for over a year now. To the extent that the plaintiffs argue that it really ought to

come in as impeachment, I understand the argument. I would say that in my view it's not really classic impeachment certainly, and even if it's characterized as impeachment, if reports by experts and testimony by experts were allowed to come in under the guise of I'm impeaching the credibility of the other expert, than it really would eviscerate the limit that the Court placed on an initial round and then a rebuttal round and no sur-rebuttals.

So the conclusion from all that is that Dr. Bushnell's report, I think, violates the pretrial scheduling order and is excludable both under Rule 37B2A2, and under Rule 16F1C.

You know, all of that is not to say I'm not suggesting that Dr. Bushnell's critique or the impeachment that counsel wants to make of Dr. Abraham is somehow not available to them on cross-examination or somehow is not a fair subject for examination of Dr. Abraham. But I don't think it's not available to them in the form of an expert who takes the stand and puts their imprimatur of their credentials and opinions on top of the impeachment. The evidence itself may or may not come in, but it's not going to come in in the form of Dr. Abraham or Dr. Bushnell's report. I appreciate the dilemma that counsel faced, and I think certainly plaintiff's counsel is to be complimented for making the disclosure but that doesn't change the

result.

As to Dr. David's report, it's not, I guess I would not see it as an impermissible sur-rebuttal, though I suppose one could characterize it that way. It's really a question of supplementation because it really amplifies and expands on his initial report as to feasible alternative designs by adding I think it's six or so other alternative designs. But those feasible alternative designs were properly the subject of the plaintiff's initial expert reports, and so the question really turns on whether this is a proper supplementation, and I find under the rules that it's not for the following reasons:

The newly disclosed designs did exist at the time of the initial report. The studies that Dr. David references in support of those alternative designs were all published prior to his report with the exception of the one that was published after his report but prior to the deposition. So it's not a supplementation based on new information, new studies, new things that could not have been disclosed initially.

As to the rationale that the plaintiffs argue that the Court's ruling on the motion in limine in Gareis and then as described, it's retrenchment of that ruling, somehow opened the gate to additional feasible alternative designs is unpersuasive for a couple of reasons.

First of all, before the initial order, at least as I understand the facts, Dr. David had in fact disclosed the device or the alternative designs that were later excluded. So certainly additional such designs or I think they were described as patient conductive warming devices could have been disclosed at the time of his initial report.

As to the argument that it's premature to disclose the full range of potential feasible alternative designs because the law that will be applied to each individual case may be different, again, I find that unpersuasive because the law was certainly known, and there's no argument that there's been a sea change in the law since the time of Dr. David's initial report. So I think the upshot is it's really incumbent on the plaintiff, and I understand it may seem an undue burden, but I don't think it is, and I think it's certainly a burden that is imposed by the Court's, the structure of its scheduling orders, that it's incumbent on the plaintiff with respect to an issue such as feasible alternative design to give us fulsome an opinion as they can at the time about what alternative designs exist, what are out there, and what could be alternatives.

So going back to my earlier point about Gareis though, I think it can't be said that the relevance of these after disclosed devices, the ones that are now in Dr. David's newest report, that the relevance or the need or

desirability to disclose those only came to plaintiff's attention as a result of the Gareis order or trial.

I do find -- so I don't think there's a justification, a substantial justification for the supplementation. And I do find that plaintiff is prejudiced by the disclosure, either they can't take additional discovery, or if they can, it is requiring them to do so on the eve of trial and to undertake substantial investigation as the case careens toward trial.

And by way of legal support for this ruling, I would rely on, I do rely upon the *3M v. Dow* case reported at 2005 Westlaw, 6007042. The *Medtronic* case that's reported at 2008 Westlaw, 4601038. The *Cook* case reported at 580 F. Supp. 2d 1071, and there are others, so I rely on those, but the gist of it is under Rule 37(c)(1), I do think that Dr. David's report needs to be excluded.

One last comment on his report and that is regarding the nature of MDLs, I understand that, yes, as the case, as a particular case gets ready for trial, the fact that it is governed by the law of a particular state will in fact govern how, you know, what precisely is admissible and what precisely the parties decide to utilize in their trial and that the function of bellwethers is in fact among other things to educate the parties on what was persuasive and what wasn't and to change or amend their presentation and

their evidence.

But that argument goes too far if it is a justification for saying that an expert can disclose a few feasible alternative designs and then disclose as many feasible alternative designs when a particular case gets ready for trial. I think that would essentially undermine the efficiency of an MDL and the purpose of staggering discovery as between general issues and case specific issues.

So I hope that gives you some guidance. I hope that you understand the Court's rationale. I will follow this up with some level of written order, but you should understand the rationale as I've given it here. The order will not perhaps be as long as it would in the ordinary course because I want to make sure that you can get on up to Judge Ericksen if you choose to do that. And if you don't choose to do that at least, then you have a guide post for what's going on in the future. Okay?

So anything further for the plaintiffs, Ms. Zimmerman?

MS. ZIMMERMAN: No, Your Honor.

THE COURT: All right. Thank you.

Ms. Young, anything further for the defendants?

MS. YOUNG: No, thank you, Your Honor.

THE COURT: Okay. Thank you all. Court is in

recess.

(Court adjourned at 10:55 a.m.)

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REPORTER'S CERTIFICATE

I, Maria V. Weinbeck, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: *s/ Maria V. Weinbeck*

Maria V. Weinbeck, RMR-FCRR